Dato' Seri Anwar bin Ibrahim v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–158–09 OF 2012
KAMARDIN HASHIM J
18 JANUARY 2013

Civil Procedure — Setting aside — Application for — Street protest — Whether provisions under s 4(1)(c), (2)(c) of the Peaceful Assembly Act 2012 null and void — Whether contravened with art 10(2)(b) of the Federal Constitution — Right of assembly peaceably without arms — Intention of parliament in enacting provisions

In the sessions court, the applicant was charged with two counts relating to street protest, which were offences under the Peaceful Assembly Act 2012 ('the Act'). Along with two others, he pleaded not guilty to the charges. The applicant contended that street protest was a form of an assembly and the Parliament in enacting provisions under s 4(1)(c) and 4(2)(c) of the Act, banning street protest, was ultra vires art 10(2)(b) of the Federal Constitution ('Constitution'). Therefore, the applicant contended that s 4(1)(c) and 4(2)(c) were null and void and of no effect. The applicant submitted that the court should set aside the two charges. In the present application, the court was confronted with the question of whether the provisions of s 4(1)(c) and 4(2)(c) of the Act were inconsistent with, and contravened art 10(1)(b) of the Constitution and were, therefore, void pursuant to art 4(1).

Held, dismissing the application:

(1) Section 4(1)(c) and 4(2)(c) of the Act neither violated nor contravened art 10(1)(b) of the Constitution and therefore were not null and void under art 4(1). Article 10(1)(b) of the Constitution conferred right of an assembly peaceably without arms but subjected to restrictions necessary or expedient in the interest of the security of the Federation or any part or of public order. In other words, that freedom of assembly was not an absolute right (see paras 6–9).

(2) The Parliament had an extensive and valid power to regulate human rights such as right to organise and participate in a peaceful assembly without arms and at the same time to impose certain restrictions as its deems necessary or expedient in the interest of the security of the Federation or any part thereof or of public order as envisaged under cl (2)(b) of art 10 of the Constitution. Parliament in enacting the impugned provisions banning street protest was within the ambit of powers conferred to it under that cl (2)(b) of art 10 (see para 13).

(3) Street protest or demonstration as its normally known is also not allowed

in other jurisdiction. Banning street protest as one of the form of peaceful assembly without arms is necessary in a democratic society for the protection of morals and the rights and freedom of others. Even civic experience had shown that rights could not be absolute because they have to balance against one another. This process of balancing against one another, entailed as of necessity, placing limits on the extent to which these rights were enjoyed (see para 14).

[Bahasa Malaysia summary

Di mahkamah sesyen, pemohon dituduh dengan dua tuduhan berkaitan demonstrasi jalanan, yang mana adalah kesalahan di bawah Akta Perhimpunan Aman 2012 ('Akta'). Bersama dengan dua orang lagi, pemohon memplid tidak bersalah kepada tuduhan tersebut. Pemohon berhujah bahawa demonstrasi jalanan adalah bentuk perhimpunan dan Parlimen dalam mengubal peruntukan di bawah s 4(1)(c) dan 4(2)(c) Akta, mengharamkan demonstrasi jalanan, adalah ultra vires perkara 10(2)(b) Perlembagaan Persekutuan ('Perlembagaan'). Oleh itu, pemohon berhujah bahawa s 4(1)(c) dan 4(2)(c) adalah terbatal dan tidak sah dan tidak mempunyai kesan. Pemohon berhujah bahawa mahkamah patut mengenepikan kedua-dua tuduhan tersebut. Dalam permohonan ini, mahkamah berhadapan dengan persoalan sama ada peruntukan s 4(1)(c) dan 4(2)(c) Akta tidak konsisten dengan dan bertentangan perkara 10(1)(b) Perlembagaan dan oleh itu, terbatal berikutan perkara 4(1).

Diputuskan, menolak permohonan:

(1) Seksyen 4(1)(c) dan 4(2)(c) Akta kedua-dua tidak mencabuli atau melanggar perkara 10(1)(b) Perlembagaan dan oleh itu sah dan tidak terbatal di bawah perkara 4(1). Perkara 10(1)(b) Perlembagaan memberikan hak untuk perhimpunan aman tanpa senjata tetapi tertakluk kepada sekatan yang perlu atau wajar demi kepentingan keselamatan Persekutuan atau mana-mana bahagian atau ketenteraman awam. Dalam perkataan lain, kebebasan perhimpunan bukan hak mutlak (lihat perenggan 6–9).

(2) Parlimen mempunyai kuasa yang luas dan sah untuk mengawal hak kemanusian seperti hak untuk menganjur dan menyertai perhimpunan awam tanpa senjata dan pada masa yang sama mengenakan sekatan-sekatan tertentu kerana ia dianggap perlu atau wajar demi kepentingan keselamatan Persekutuan atau mana-mana bahagian di dalamnya atau ketenteraman awam seperti yang dibayangkan di bawah klausa (2)(b) perkara 10 Perlembagaan. Parlimen dalam mengubal peruntukan untuk mengharamkan demontrasi jalanan adalah dalam skop kuasa yang diberikan kepadanya di bawah klausa (2)(b) perkara 10 tersebut (lihat perenggan 13).

(3) Demonstrasi jalanan atau demonstrasi seperti yang biasa dikenali juga tidak dibenarkan dalam bidang kuasa lain. Mengharamkan demonstrasi jalanan sebagai salah satu bentuk perhimpunan aman tanpa senjata adalah perlu dalam masyarakat demokratik untuk perlindungan moral dan hak dan kebebasan orang lain. Malah pengalaman sivik juga telah menunjukkan bahawa hak tidak boleh menjadi mutlak kerana ia mesti imbang terhadap satu sama lain. Proses imbangan antara satu sama lain ini, melibatkan sebagai keperluan, meletakkan had ke atas sejauh mana hak-hak dinikmati (lihat perenggan 14).]

Cases referred to

Application of Tan Boon Liat @ Allen; Tan Boon Liat, Re v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1976] 2 MLJ 83; [1976] 1 LNS 126 (refd)

Legislation referred to

Federal Constitution arts 4, 10(1)(b), (2)(b)
Peaceful Assembly Act 2012 ss 3, 4(1)(c), (2)(c)

Karpal Singh (Ram Karpal Singh and Zaleha Sikkander Hayat with him) (Karpal Singh & Co) for the applicant.
Abdul Wahab Mohamed (Mohamad Hanafiah Zakaria, Ishak Mohd Yusof and Mohd Farizal with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Kamardin Hashim J:

[1] The applicant, an elected Member of Parliament for the Constituency of Permatang Pauh, together with two others was charged before the session court with two counts of offences under the Peaceful Assembly Act 2012 ('Act 736'). All of them pleaded not guilty to both of the charges. Both charges relates to street protest which was prohibited under the Act.

[2] By this application, the applicant posed a question for this court determination as to the effect of a provision under s 4(1)(c) and 4(2)(c) of the Act which prohibit street protest in the light of art 10(1)(b) of the Federal Constitution which guaranteed freedom of an assembly peaceably and without arms.

[3] The question posed to this court is:

> Whether the provisions of ss 4(1)(c) and 4(2)(c) of the Peaceful Assembly Act 2012 are inconsistent with, and contravene, the provisions of art 10(1)(b) of the Federal Constitution and are, therefore, void pursuant to art 4(1) thereof.

[4] Article 10(1)(b) of the Federal Constitution confers right of an assembly

peaceably without arms but subject to restrictions necessary or expedient in the interest of the security of the Federation or any part thereof or of public order. In other words, that freedom of assembly is not an absolute right. Article 10 read as follows:

> 10. Freedom of speech, assembly and association
>
> (1) Subject to Clause (2), (3) and (4) —
>
> (a) Every citizen has the right to freedom of speech and expressions;
>
> (b) All citizens have the right to assemble peaceably and without arms; and
>
> (c) All citizens have the right to form associations.
>
> (2) Parliament may by law impose —
>
> (a) On the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;
>
> (b) On the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order;
>
> (c) On the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality.
>
> (3) Restrictions on the right to form associations conferred by paragraph (c) of Clause (1) may also be imposed any law relating to labour or education.
>
> (4) In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2)(a), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.

[5] Whereas, art 4(1) thereof provides that Federal Constitution is the supreme law of Malaysia and any laws passed after 31 August 1957 (*Merdeka Day*) which inconsistent with the Federal Constitution shall, to the extent of the inconsistency, be void. But, the validity of any laws shall not be questioned on the ground that, inter alia, it imposes such restrictions as are mentioned in art 10(2) thereof.

[6] Peaceful Assembly Act 2012 ('Act 736') was enacted by Parliament by virtue of art 10(2)(b), to impose certain restrictions on the right to assemble peaceably and without arms, as its deems necessary or expedient in the interest of the security of the Federation or any part thereof or of public order.

[7] The object of this Act 736 is to ensure that all citizens have the right to organize assemblies or to participate in assemblies peaceably and without arms. However that right is subjected to the interest of the security of the Federation or any part thereof or of public order which includes the protection of the rights and freedoms of other person.

[8] Abdoolcader J in *Re application of Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 2 MLJ 83; [1976] 1 LNS 126 said:

> The expression 'public order' is not defined anywhere but danger to human life and safety and the disturbance of public tranquility must necessarily fall within the purview of the expression. It is used in a generic sense and is not necessarily antithetical to disorder, and is wide enough to include considerations of public safety within its signification.

[9] Section 4(1)(c) and 4(2)(c) of the Act which the applicant took objection to it and under which the applicant with two others stand charged at the lower court, provides that street protest is not permitted under the Act. A person commits an offence if he or she organises or participates in street protest. The penalty provided on conviction, be liable to a fine not exceeding ten thousand ringgit.

[10] Street protest had been defined under the Act to means 'an open air assembly which begins with a meeting at a specified place and consists of walking in a mass march or rally for the purpose of objecting to or advancing a particular cause or causes'.

[11] According to legal definition: *Street Protest Law & Legal Definition of USA*, a street protest is 'an action by a group of people to show their negative or positive viewpoint regarding a public issue. Usually, a street protest is carried out in relation to a perceived grievance or social injustice. It ordinarily consists of walking in a mass march formation and either beginning with or meeting at a designated endpoint, or rally, to hear speakers. Street protest can be either nonviolent or violent, or it can begin as nonviolent and turn violent depending on circumstances. A street protest can be carried out in several forms such as marches, nudity, either threatened or carried out; rallies in which people gather to listen to speakers or musicians, picketing and sit-ins. Actions such as

blockades are also considered as street protest. It is also called as a demonstration'. Street protest in another word is 'demonstrasi jalanan'.

[12] The applicant holds the view that, as contains in his affidavit affirmed on 3 September 2012 at paras 6–7 that street protest is a form of an assembly and Parliament in enacting provisions under s 4(1)(c) and 4(2)(c) of the Peaceful Assembly Act 2012 banning street protest was ultra vires art 10(2)(b) of the Federal Constitution. It is the applicant's contention that s 4(1)(c) and 4(2)(c) thereof is null and void and of no effect. The applicant therefore urged the court to set aside the two charges labeled at him and the two others.

[13] I have heard submissions from both parties cited herein and I am of the view that Parliament had an extensive and valid power to regulate human rights such as right to organise and participate in a peaceful assembly without arms and at the same time to impose certain restrictions as its deems necessary or expedient in the interest of the security of the Federation or any part thereof or of public order as envisaged under cl (2)(b) of art 10 of the Federal Constitution. Parliament in enacting the impugned provisions banning street protest is within the ambit of powers conferred to it under that cl (2)(b) of art 10 thereof.

[14] I believe that street protest or demonstration as its normally known is also not allowed in other jurisdiction. Banning street protest as one of the form of peaceful assembly without arms is necessary in a democratic society for the protection of morals and the rights and freedom of others. Even civic experience has shown that rights cannot be absolute because they have to balance against one another. This process of balancing against one another, entails as of necessity, placing limits on the extent to which these rights are enjoyed.

[15] Parliament in exercising powers conferred to it under art 10(2)(b) prohibits street protest. I found that the prohibition impose by Parliament is reasonable in view for the protection of the interest of the security of the nation and for maintaining of public order. This court take judicial notice that by having or allowing street protest it will transgress the rights and freedom of other persons which is defined under s 3 of the Act which includes:

(a) the right to peaceful enjoyment of one's possession;

(b) the right to freedom of movement;

(c) the right to enjoy the natural environment; and

(d) the right to carry on business.

[16] After careful considerations of what had been said and submitted by

both sides, I hold the view that s 4(1)(c) and 4(2)(c) of the Peaceful Assembly Act 2012 neither violate nor contravenes art 10(1)(b) of the Federal Constitution and therefore are not null and void under art 4(1) thereof.

[17] Accordingly, based on the aforementioned reasons, my answer to the question posed is in the negative.

Application dismissed.

Reported by Afiq Mohamad Noor